

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHAWN ROBERT BRADLEY,

Defendant-Appellant.

UNPUBLISHED

October 14, 2003

No. 241344

Macomb Circuit Court

LC No. 01-003768-FH

Before: Kelly, P.J. and Cavanagh and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of operating a motor vehicle while under the influence of intoxicating liquor/per se (OUIL), third offense, MCL 257.625, and driving while license suspended (DWLS), second offense, MCL 257.904. Defendant was sentenced to one year and eleven months to five years in prison for the OUIL conviction, and one year in jail for the DWLS conviction. We affirm.

Defendant argues that defense counsel failed to provide effective assistance with regard to the admission of defendant's blood test results. We disagree.

Because defendant failed to move for a new trial or a *Ginther*¹ hearing, our review is limited to the existing record. *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court's findings of fact for clear error. *Id.* We review questions of constitutional law de novo." *Id.*

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense so as to deny defendant a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). The defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different."

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

People v Stanaway, 446 Mich 643, 687; 521 NW2d 557 (1994). The defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy. *Id.*

In this case, defendant alleges that trial counsel failed to provide effective assistance of counsel by failing to object to the foundation laid for admission of defendant's blood test results. In order for a prosecutor to properly submit blood alcohol test results, the following foundational requirements must first be met:

“[T]he party seeking introduction must show (1) that the blood was timely taken (2) from a particular identified body (3) by an authorized licensed physician, medical technologist, or registered nurse designated by a licensed physician, (4) that the instruments used were sterile, (5) that the blood taken was properly preserved or kept, (6) and labeled and (7) if transported or sent, the method and procedures used therein, (8) the method and procedures used in conducting the test, and (9) that the identity of the person or persons under whose supervision the tests were conducted be established.” [*People v Cords*, 75 Mich App 415, 427; 254 NW2d 911 (1977), quoting *Gard v Michigan Produce Haulers*, 20 Mich App 402, 407-408; 174 NW2d 73 (1969).]

Compliance with the first six criteria requires the testimony of the medically qualified individual who had taken the blood sample. *Id.* These rules were designed to insure that the blood tested was that of the accused and to prevent the admission of test results obtained from an unreliable blood sample. *Id.* at 427-428.

Defendant claims that all the requirements were not established. But the record indicates that they were established through witness testimony. As in *Cords*, Nurse Geiman, who extracted the blood, established the third and fourth criteria. *Id.* Nurse Geiman testified that she performed the blood draw, per the search warrant and per Dr. Flynn's order which followed his examination of defendant. Both Nurse Geiman and Deputy Shell testified to using a state of Michigan standardized blood draw kit. Nurse Geiman used a Betadine prep pad, rather than an alcohol prep pad, to ensure the level of alcohol in defendant's blood was not altered. Nurse Geiman also testified that the blood sample was properly labeled and sealed by Deputy Shell in her presence. Because the trial testimony establishes the necessary foundation for the admission of defendant's blood test results, defense counsel's failure to object to the admission does not constitute error. Defense counsel is not obligated to make futile objections. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

Defendant also claims that defense counsel failed to comment on the improper admission of defendant's blood alcohol test results during his presubmission motion for a directed verdict and failed to make a post verdict motion for directed verdict based on improper admission. But defense counsel moved for a presubmission directed verdict based on an insufficient showing by the prosecutor that the blood draw was pursuant to a doctor's order. The trial court denied the motion. Defense counsel did not raise another motion for directed verdict. Because the record establishes a proper foundation for the admission of defendant's blood test results, and because defendant's first motion for a directed verdict based on an improper foundation was denied, another motion for a directed verdict would have been without merit. Again, defense counsel is not required to make frivolous or meritless motions. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Even if defense counsel's failure to object to the admission of defendant's blood test results was unreasonable, defendant still failed to show that he was prejudiced by its admission. There is enough evidence of defendant's intoxication to convict defendant without his blood test results. Deputy Shell observed defendant driving with the right side of the vehicle on the shoulder of the road. Deputy Shell also observed that defendant had been drinking by his disheveled appearance and the smell of alcohol on his breath. Nurse Geiman observed that defendant had alcohol on his breath, a staggered gait, and a quick heart rate. Defendant admitted to drinking a half pint of vodka and another alcoholic beverage. Defendant also testified to feeling tipsy because he drank the alcohol while on seizure medication. Because defendant's intoxication could have been established through witness testimony and through his own testimony, defendant has failed to show that there is a reasonable probability that the results of the proceeding would have been different if his blood test results would have been excluded from evidence.

Defendant has failed to show that defense counsel's performance fell below an objective standard of reasonableness or that it prejudiced his defense so as to deny him a fair trial. Therefore, we hold defendant was not denied the effective assistance of counsel.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Mark. J. Cavanagh
/s/ Michael J. Talbot